IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Case No.: LCC133/2012

In the matter between:

MSINDO PHILLEMON MSIZA	Applicant
And	
DIRECTOR-GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	1st Respondent
MINISTER FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	2nd Respondent
JOHANNES UYS N.O.	3rd Respondent
DIRK CORNELIUS UYS N.O.	4th Respondent

JUDGMENT

NGCUKAITOBI AJ:

INTRODUCTION

1 The question presented before this Court concerns the determination of compensation in accordance with section 23(1) of the Land Reform (Labour Tenants) Act 3 of 1996 ("the Act") due to the applicant. The merits of the matter were decided by Moloto AJ in *Msiza v Director-General, Department of Land Affairs, and Others*, case number LCC39/01, delivered on 16 November 2004. Moloto AJ held that the applicant qualifies as a "labour tenant" within the definition of the Act. Their application for an award of land pursuant to section 16(1)(a) and (b) of the Act was approved by this Court.

2 The specific area of land awarded to the applicant was described as "*the area of the homestead*, *demarcated by the fence on the perimeter of the homestead yard*"; "*four parcels of cropping land, each 600 x 50 paces in extent*"; and "*grazing land in extent equal to the rest of Rondebosch less the remainder of the ploughing fields*". During the current trial, it was established that the name "Rondebosch" refers to part of the farm in which the land awarded to the applicant is located.

3 Pursuant to the award mentioned above, the current proceedings were instituted. There is a dispute between the land owner, the third and fourth respondents and the State respondents, being the first and second respondents, as to the correct value to be attached to the awarded land. This Court has been requested to determine the amount to be awarded.

4 The powers of this Court to determine compensation are set out in section 23 of the Act. That section states that an owner of affected land "*shall be entitled to just and equitable compensation as prescribed by the Constitution*". In section 23(2) it is stated that if there is no agreement as to the amount of compensation it must be determined by arbitration or by this Court. The further powers of the Court as provided for in section 23(3) pertain to the manner of the payment as well as the period by which the payment of compensation should be made.

5 Subsequent to the leading of evidence, parties were directed to make submissions essentially dealing with the test to be applied by this Court in determining compensation according to section 23(1) of the Act. The parties submitted written argument setting out their respective positions in relation to

the test to be applied, by reference to section 25 of the Constitution. Both parties tendered the evidence of expert valuers to assist the Court to determine the just and equitable compensation. In addition to the expert valuers, the owners gave evidence. Before I assess the evidence, it is appropriate to set out the correct legal position in the assessment and determination of just and equitable compensation.

AN ACT OF EXPROPRIATION

6 In order for section 25 of the Constitution to apply, it must first be decided if the act of deprivation in question constitutes an act of expropriation. For the reasons which follow, I conclude that it does. The award of land to the applicant by this Court in its 2004 judgment constituted an expropriation in terms of section 25 of the Constitution.

7 This award of land satisfied both the definition of expropriation contained in the jurisprudence as well as three requirements for expropriation contained in section 25 of the Constitution. The provisions of the Labour Tenants Act also suggest that the Act itself creates a scheme of "judicial expropriation."[1]

8 Expropriation is not defined in the Constitution. In *Harksen v Lane NO* 1998 (1) SA 300 (CC) it was defined as "*the compulsory acquisition of rights in property by a public authority*".[2] The term "compulsory" means "compelled by law". In *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34

[1] A term borrowed from Meer J's judgment in *Khumalo*, which is addressed fully below.
[2] At para [32].

(CC) at par [4] it was held that expropriation is "*the compulsory taking over of property by the State to obtain a public benefit at private expense*".

9 The award of land to the applicant by this Court in its 2004 judgment is an act of expropriation.

9.1 First, the transfer of the land to the applicant is compulsory. The third and fourth respondents in this matter resisted the initial application and sought to argue that the applicant's father was not a labour tenant under the Act. The effect of the Court's 2004 order was to force the third and fourth respondents to relinquish the affected land to the applicant's family, subject to just and equitable compensation.

9.2 Second, the Act provides for the acquisition of land by the State, which is then in turn given to a private beneficiary. The role of the private beneficiary (the applicant) in this matter will be discussed further below, but the land will be acquired by the State for his benefit. Thus the award will definitely lead to an acquisition of land by the State for the applicant.

10 The award of land by this Court further satisfied the requirements for an expropriation as laid out in the Constitution. Section 25(2) of the Constitution sets out three criteria for an expropriation: namely that it must be (1) carried out in terms of a law of general application; (2) that it must be in the public interest or for a public purpose; and (3) that just and equitable compensation be provided.

11 In terms of the first requirement, the Act is clearly a law of general application,

as it applies to all labour tenants generally.

12 For the second requirement section 25(2)(a) provides that the expropriation must be for a public purpose or in the public interest. In pre-constitutional expropriation law, expropriations were limited only to those for a public purpose. While public purpose was interpreted widely at this time, it was not wide enough that the expropriation of land for the benefit of a third party (i.e. for land reform purposes) would be considered a public purpose.

13 Therefore, one of the main concerns during the drafting of the Constitution was that expropriation should be possible for land reform purposes in the new constitutional era. The potential problem was that public purpose would be interpreted too narrowly and would therefore not permit for expropriation for the benefit of private beneficiaries. In response to this concern, public interest was added to the final Constitution as a requirement, and more importantly section 25(4) was added to ensure that land reform purposes would be included.

14 Section 25(4)(a) of the Constitution states that "*public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.*" As such the Constitution explicitly confirms that expropriations for the benefit of private individuals are permissible for the purposes of land reform. In addition, sections 25(5) to (9) provide the further basis for land reform in South Africa.

15 In general, an expropriation by the State that is done specifically for the benefit of a private individual would not be a public purpose, but a private one and as

such not permissible. However, section 25(4) of the Constitution makes it clear that an expropriation that benefits a private individual will be permissible in the land reform context. In this sense, the purpose of the expropriation transcends the immediate concerns of an individual – it is for the benefit of the public at large. There is a clear public interest in addressing the legacy of landlessness which comes from colonial occupation and apartheid. The effect is that the benefit is conferred to a private individual, but it is done so in the public interest to fulfil redistributive justice, which lies at the cornerstone of section 25 of the Constitution. This interpretation is supported by section 25(4) which stipulates that the term "*public interest*" be interpreted to include "*the nation's commitment to land reform*".

16 The third requirement for an expropriation is found in sections 25(2) and (3) of the Constitution. Read together, these sections require that the time and manner of payment of compensation must be just and equitable, reflecting "*an equitable balance between the public interest and the interests of those affected*". The determination of what is just and equitable compensation in this case is at issue here. As such, the 2004 judgment awarding land to the applicant satisfied the third requirement for an expropriation. It is plain that the landowners are entitled to compensation pursuant to this Court's 2004 decision.

17 Furthermore, the Act itself seems to imply that it establishes an expropriation scheme. This was addressed briefly in the first *Khumalo* judgment when Dodson J stated that "*It is quite clear that a form expropriation is contemplated if the section 16 (Labour Tenants Act) application is successful*".

18 Section 23(1) of the Act specifically requires that "*just compensation [must be] as prescribed by the Constitution*". This reference to section 25(3), the clause of the Constitution that deals with the determination of compensation for expropriation of property, clearly implies that the Act does authorises expropriations in form and in substance.

19 In addition section 23(3) of the Act further states that if the parties are not able to reach an agreement for compensation, the Court may determine what is just and equitable. This wording further complies with section 25(3) of the Constitution which demands just and equitable compensation for an expropriation.

20 In the second *Khumalo* judgment, Meer J recognised that the Act "*introduced a new scheme for the expropriation of land to secure the position of labour tenants*". Citing the judgment of Dodson J, Meer J also found that the awarding of the properties in the *Khumalo* case constituted *"a judicial expropriation"*. This scheme is part of the State's wider land reform programme moored in section 25(4) of the Constitution.

21 The award of land to the applicant in this Court's 2004 judgment therefore constitutes an expropriation under section 25 of the Constitution read together with the Act. I consider the principles applicable for payment of compensation pursuant to an act of expropriation.

THE PRINCIPLES OF JUST AND EQUITABLE COMPENSATION

22 As noted, section 23(1) of the Act mandates this Court to award compensation which is just and equitable. The origins of the term just and equitable compensation in respect to land acquired on a compulsory basis by the State is to be found in section 25(3) of the Constitution. That section, used therein in the context of expropriation, provides:

> *"The amount of the compensation and the time and manner of the payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –*
>
> *(a) the use of the property;*
>
> *(b) the history of the acquisition and use of the property;*
>
> *(c) the market value of the property;*
>
> *(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
>
> *(e) the purpose of the expropriation."*

23 The statute accordingly places the framework of the Constitution at the centre of the analysis. Compensation must be "*as prescribed by the Constitution*".

24 The starting point, accordingly, is an examination of section 25 of the Constitution itself. It is through that prism that section 23 of the Act can be understood. The structure of section 25 is the following.

24.1 Sections 25(1) to (3) serve a dual purpose. First, they recognize existing property rights. But even in that recognition, expropriation for a public purpose or in the public interest is expressly provided for if it complies with the Constitution.

24.2 When section 25(3) refers to expropriation in the public interest, that requirement is given a concrete expression by section 25(4) which states that the notion of the public interest includes South Africa's commitment to land reform.

24.3 Sections 25(5) to (9) are generally concerned with the process of land reform. The State is obliged to take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.[3] In terms of section 25(6) a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an act of parliament, either to tenure which is legally secure or to comparable redress. The date for lodgment of claims is said by section 25(7) to be 19 June 1913. In section 25(8) the Constitution provides that section 25 should not be construed in a manner which constitutes an impediment to the State from taking legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination, provided that any departure from the provisions of section 25 is consistent with section 36(1) – the limitation provisions. In terms of section 25(9) Parliament is required to

[3] Section 25(5).

enact legislation that deals with security of tenure as required by section 25(6) of the Constitution.

25 The structure of section 25 is accordingly clear. Existing property rights are protected through the prohibition against deprivation except through a law of general application and a prohibition from passing a law which permits arbitrary deprivation. The State is entitled to expropriate land for a public purpose or in the public interest. Any expropriation must be subject to compensation which has either been agreed or if no agreement decided by a Court. The amount of compensation need be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected. When determining just and equitable compensation, certain factors listed in section 25(3)(a) to (e) should be taken into consideration. Land reform is one of the objects of the Constitution.

26 The structure to section 25, which is set out above, has been confirmed by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) where it was held that subsections 25(4) to (9):

> *"All, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa".*[4]

[4] At para [49].

27 The object of the Labour Tenants Act is plain: It seeks to grant security of tenure to labour tenants who do not have security of tenure. It seeks to guarantee labour tenants security of tenure or in appropriate circumstances financial compensation. The Act protects labour tenants from unlawful eviction. Furthermore, in appropriate cases the Act seeks to ensure the fullest possible substantive benefit for labour tenants by way of an award in land which would constitute ownership. The public interest behind the provisions of the Act is accordingly manifest.

28 Another aspect of the scheme designed by the Act which requires highlighting at this stage is the fact that the funds from which the compensation must be paid in order to secure land for the benefit of labour tenants emanate from the public purse.

29 The purposes behind the determination of just and equitable compensation must be to serve the broader public interest which underlies the provisions of section 25. In this trial, the third and fourth respondents were insistent upon the payment of market value for compensation. I must dispense with this argument at this early stage. Market value is not the basis for the determination of compensation under section 25 of the Constitution where property or land has been acquired by the State in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a Court assesses just and equitable compensation. It is not correct to submit, as was done on behalf of the landowners, that the jurisprudence of this Court has installed market value as a preeminent consideration.

30 Properly understood, the jurisprudence of this Court shows that market value is regularly used as an entry point to the analysis because it is the most tangible factor in all of the factors listed in section 25(3). This is not to make market value the most important factor in the analysis of just and equitable compensation; the object is always to determine compensation which is just and equitable, not to determine the market value of the property.

31 I deal next with the proper application of the factors listed in section 25 of the Constitution.

APPLYING SECTION 25 OF THE CONSTITUTION

32 The existing Expropriation Act, 1975, an Act passed during the apartheid era makes it clear that market value is the formula for determining compensation due to a person whose land has been expropriated by the State. The Constitution is a rejection of the market based approach to land reform and compensation in cases of expropriation. Market value is one of a number of considerations. Compensation must be just and equitable. In determining what is just and equitable, a balance must be struck between the interests of the private land owner and the public interest. Thus, compensation which is below the market value can be compliant with the Constitution, if it qualifies as just and equitable.

33 It is significant that the five factors listed in the Constitution need not be applied in any hierarchy. In *Former Highlands Residents, in re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) ("*Highlands*") this Court noted that (c)

market value and (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property are the only factors which lend themselves to easy quantification in monetary terms.

34 Gildenhuys J held that market value should serve as the starting point for the determination of compensation because it is quantifiable. As such, Gildenhuys J established a two-stage method.[5]

34.1 First, the market value of the affected land; and

34.2 Second, after deciding the market value, the remaining factors would be applicable

35 In this way, market value would serve as the starting point for the determination of compensation, which would then be adjusted either upward or downward depending upon the application of the other factors which would thus strike an equitable balance between the public and private interest.[6]

36 The underlying rationale for this two-step approach is that there is no precise method for calculating values that are based on considerations of equity and justice.

37 This two-step approach has received endorsement. The Constitutional Court *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC)[7] adopted the method. In *Khumalo* and *Kookfontein* and *Baphiring Community v Uys and Others* 2007 (5)

[5] *Highlands*, paras [34]-[35].
[6] *Kookfontein* (para [52]), citing *Highlands* para [34] at 40c-e, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para [34] at 316B-E.
[7] At paras [25]-[28].

SA 585 (LCC) this Court also accepted the method.[8] And so did the Supreme Court of Appeal in *Abrams v Allie NO* 2004 (9) BCLR 914 (SCA)[9] and *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA).

38 I shall also apply the two-stage formula for the reasons set out in the judgments set out above. In so doing, I should not be understood as accepting the logic of the two-stage approach. I believe that other factors in section 25 of the Constitution can also be easy to quantify. For instance, it is easy to work out the history of acquisition, and reference may also be had to historical records to determine the value of the land over time.

First stage: Market value of the property

39 In valuing the affected land, the first, second, third and fourth respondents have accepted market value as the method to be used in valuation. In its terms of reference for the valuation dated 25 November 2014, the Department instructed the valuer to provide "*the market-related value, which will enable the DRDLR to table an offer to purchase on market value of the land*".[10] Similarly, the valuations provided by Mr Scholtz for the third and fourth respondents provides for the definition of market value contained in the International Valuation Standards Committee as *"the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in the arms-length transaction after proper marketing wherein the parties had*

[8] At para [23].
[9] At para [15].
[10] It is not clear why the state insists on purchasing land for land reform purposes at market related rates, when the Constitutional scheme provides for just and equitable compensation.

each acted knowledgeably, prudently and without compulsion." [My underlining]

40 Furthermore, in determining the market values, the first, second, third and fourth respondents have agreed to use the comparable sales method of valuation which involves comparing recent sales of land in the surrounding area with similar attributes. The valuation reports provided by both Mr Scholtz and DPP utilize the comparable sales method in reaching their conclusions. As stated by Scholtz in his evidence the difference in the approaches of the valuers is whether the land is being valued in its current use or for its possible future use.

41 In *Khumalo,*[11] this Court adopted the *Point Gourde* principle.[12] Under this principle, market value at the time of an expropriation must be determined by disregarding any increase or decrease in the market value consequent upon the scheme of expropriation. This principle was developed because an expropriation often has the effect of distorting the market, whether positively or negatively. Therefore, in order to determine the real market value of a property, it must be viewed as though the expropriation scheme did not exist.

42 In *Khumalo*, Meer J held that section 25(3) of the Constitution must be interpreted to include the *Point Gourde* principle when determining market value.[13] The *Point Gourde* principle is a helpful guide to the fair and objective determination of market value since it precludes the subjectivity of price

[11] Para [26]
[12] *Pointe Gourde Quarrying & Transport Co Ltd v Sub-intendent of Crown Lands (Trinidad)* [1947] AC 565 (PC)
[13] *Khumalo*, para [26]

increases or decreases because of the act of expropriation. I shall have regard to this principle below.

43 In his valuation, Mr Scholtz effectively utilizes the *Point Gourde* principle by omitting any consideration of the 2004 judgment in determining the market value of the affected land. By contrast, the valuation completed by DPP does not apply this same method.

44 The positions taken by the two experts, as contained in their reports and expounded upon during oral testimonies are the following.

44.1 According to Mr Scholtz, the expert valuer called on behalf of the landowners, the correct market value for the property is R4, 360 000.00 (four million, three hundred and sixty thousand rands). The expert valuer called on behalf of the government values the property at R1, 800 000.00 (one million eight hundred thousand rands).

44.2 The valuers have agreed on the method for the valuation to be used, which is known as “comparable sales method”. According to Mr Scholtz, this method effectively uses the values of properties which share substantially similar attributes to the property in question to arrive at a value. These attributes include the size of the property, the location of the property, and the use of the property. Historical figures – subject to necessary variations – are then taken into consideration and a figure is arrived at.

44.3 Despite the agreement at the level of principle, it was debated in Court

during the evidence of Mr Scholtz, whether in fact there were comparable sales. Mr Scholtz accepted that he could not find comparable sales as such and he used values of properties in a different area.

44.4 The joint minute filed by the experts records the extend of the common cause factors between the valuers as being the method of the valuation, being the comparable sales method, the portions of the farm to be valuated, the *"collective site extent of 45.8522ha as per approved SF diagrams"*, *"the locality and general characteristics of the subject property"*, and that no structural improvements in the property could be considered since those improvements were in the property of the claimants and not the property subject to the current claim.

44.5 The key point of difference is whether or not the "developmental potential" of the property should be taken into account. It is necessary to reflect on how this issue came about. The evidence was that the local municipality, being the Steve Tshwete Local Municipality has been interested for some time in acquiring land around the area for low cost housing. In this regard, an enquiry was made during the early part of 2015 concerning the possibility of the acquisition of the land. However, no offer to purchase was made and no further steps were taken to actually acquire the land. Another aspect of evidence concerning the *"developmental potential"* concerned an offer to purchase the property made by a private commercial enterprise, with the view of developing the land into a *"lifestyle"* residential area. In this regard, evidence was given that in 2006 there was an application made to the local council for the

rezoning of the entire farm – not simply the portion awarded to the applicant – into a township. However, for reasons related to the collapse of the stock market and the so-called housing crisis of 2008, this sale fell through. No tangible offer has materialized since then.

44.6 In this context, the positions of the valuers stood in stark contrast. Mr Scholtz testified that the best use of the property was as a township. Mr Tinus Nel, of DPP, for the government testified that the best use of the property was as agricultural.

44.7 The actual valuation amounts were not in dispute. It was common cause that if the land is valued for its agricultural use – which is its current use – the correct market value is R1.8m. On the other hand, if the possibility of the township potential is factored in, the correct market value is R4.36m.

45 My view is that the developmental potential as a factor in the calculation of market value is far-fetched and speculative.

45.1 The enquiries by the municipality cannot be elevated to an actual offer on the table. On the evidence, it was established, in any event, that the municipality has other alternatives as a source of land. In any event, I am not convinced that the mere fact of any interest exhibited by the municipality – no matter how tenuous – should be sufficient to trigger an inflation in the price of the land. It seems to be an open question whether the municipality, if it were to negotiate the purchase of the land, would buy at agricultural rates or at township rates. Given these uncertainties, I am simply unable to attach any weight to the single enquiry made by the

municipality. It must also be taken into account that there is no evidence at all as to the powers and authority of the official who made the enquiry and whether in fact he or she is in a position to take decisions which may be binding on the municipality with regard to acquisitions of such magnitude. It is no answer to say that the area falls within the *"designated developmental area"* in the municipality's developmental plans. The important fact is that there is no evidence at all, of the amount of money which the municipality might be willing to pay in the event its interest moved beyond the speculative.

45.2 The offers to purchase which were made in 2006 are simply of such antiquity that they can be rejected on that account alone. I note that it was stated in evidence that one of the reasons for the reluctance of the potential buyers in acquiring the land was the fact that the part of the land they would have been interested in included the land awarded to the applicants, but for the fact that the claim was pending, no final commercial decisions could be made. However, this is not a persuasive argument in the light of the lapse of time and the fact that no serious discussions were pursued with the applicants to acquire their land.

45.3 A further factor concerns the facts of this case. The Dee Cee Trust purchased Rondebosch farm – the entire farm on which the land in issue herein is located – in 1999. At this stage the application for the award of the land by the applicants was already pending. Therefore, at the time of purchase, the third and fourth respondents were aware that the affected portion of land was being used by the applicant and his family.

46 My view is that the market value of the land can only be determined by reference to its agricultural value, which is its current use. I reject the invitation to take into account the developmental potential of the land.

47 In coming to the above conclusion, I draw strength from the *Pointe Gourde* principle. As noted, this principle states that in determining the market value of the land to be acquired by the state through an expropriation scheme, the deciding authority must exclude any increase or decrease in the land value which would occur as a result of the expropriation. I note that the increase being urged upon this Court is not as a direct result of the expropriation. But I take into a consideration the operating logic of the principle. Applying the approach advanced by the landowner could distort the real value of the land and produce outcomes which are dissonant to the purposes behind compensation. Compensation, in terms of section 25, must first and foremost serve the public interest. The monies to be paid to expropriated persons emanate from the public purse and they are constitutionally designed to serve a discreet legal purpose, not to compensate each and every possible potential loss of commercial opportunity. That approach could also create perverse incentives for landowners to artificially raise the potential value of their land, if they know that by the simple device of generating interest in the land, its market value could be significantly altered. I conclude, based on these reasons, that the correct market value of the property is R1.8m.

Second stage: The current use of the property

48 In this Court's judgment in *Khumalo,* this factor was only considered briefly.

Meer J noted that to all intents and purposes the affected land was being used and occupied exclusively by the labour tenants. Meer J considered that because the labour tenants were "almost completely protected against eviction" by section 14 of the Act, the owner could not enforce the tenants' obligations to provide labour on the farm.[14] She concluded that this "latent obligation to work" added no value to the property and stopped the owner from deriving any benefit from the property. Meer J therefore concluded that this warranted a limited upward adjustment of the compensation amount. It will be recalled that one of the issues in contention is the current use of the property versus its potential use.

49 The facts of this case require some recounting. The Dee Cee Trust purchased Rondebosch farm – the entire farm on which the land in issue herein is located – in 1999. At this stage the application for the award of the land by the applicants was already pending. Therefore, at the time of purchase, the third and fourth respondents were aware that the affected portion of land was being used by the applicant and his family.

50 As such, from the time that Dee Cee Trust purchased the farm to date, the third and fourth respondents did not have use of the affected land. This limited any loss because the third and fourth respondents never had use of the land in the first place.

51 Since the time of the purchase to the present, the affected land has been used by the applicant and his family for agricultural purposes. The evidence is that

[14] *Khumalo,* [94].

the applicant and his family will continue to farm and graze cattle on the land.

52 I have rejected the suggestions that the actual loss of the property is the developmental potential. The actual loss is the agricultural potential. It is not without significance that the Constitution expressly refers to the current use of the property. Current use is to be distinguished not only from the historical use of the property, but also from the future use of the property. The intention is to arrive at a just and equitable determination of the compensation, free from the pervading influences of speculative forces which can distort the value of the property. The current use of the property is agricultural. It is clear that the Msiza family uses the property for those reasons and nothing has been put before us to alter this.

The history of the acquisition and use of the property

53 The requirement to consider the history of the acquisition and use of the property is a very specific enquiry based on the facts of each case. The rationale for this requirement is clear, given South Africa's history of land dispossession and racial discrimination. In particular, this factor is most relevant in cases where land was expropriated by the state and sold below market value during apartheid or made available to white farmers below market rates. In such an instance, it would indeed be unfair to pay full market value in compensation as this would enable the owner to benefit twice from apartheid.

54 The facts of the present case are not the same as those stated above, but they are relevant for a possible downward adjustment of market value based on

equitable considerations.

55 Beginning in 1970, the affected land was owned by Mrs Sarlina Gertruidia Jooste, since deceased, who during her lifetime was married to Jan Blackie Jooste. Upon her death in 1996, the affected land was transferred to her daughter, Maria Elizabeth Jooste, subject to a personal usufruct in favour of Jan Blackie Jooste. Maria Elizabeth Jooste, in turn, sold the affected land to the Dee Cee Trust on 17 December 1999 for R400 000. The title states that the Dee Cee Trust bought the farm (352.5033ha) on this date and that it was registered in the name of the Dee Cee Trust on 09 May 2000. The Dee Cee Trust has only two trustees: the third respondent (Johannes Uys N.O.) and the fourth respondent (Dirk Cornelius Uys N.O.).[15]

56 The applicant's father, Mr Amos Msiza, made his labour tenant application on 5 November 1996. At that time, Sarlina Gertruda Jooste was the registered owner of the property and her husband, Jan Blackie Jooste was managing the farm.[16]

57 The applicant's family has a long standing association with the affected land. The evidence is that the applicant's father, Mr Amos Msiza, came to live at Rondebosch in 1936 with his father, Mr Swartbooi Msiza (Mr Msiza's grandfather). Mr Amos Msiza provided labour on Rondebosch farm from 1940 and resided on the farm until his death in 1997, a period of 67 years.[17]

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[15] *Msiza v Director General for the Department of Land Affairs and Others* (LCC39/01) [2002] ZALCC 14 (19 April 2002) para [5] ("*Msiza* 2004").
[16] *Msiza (2004)* at para [3].
[17] *Msiza* (2004) at para [89].

58 In its 2004 judgment, this Court noted that the applicant and his family used to reside to the east of the current homestead until they were moved to their current home upon the expropriation of a portion of the Rondebosch farm by the municipality for the purposes of the Middleburg dam. The Msiza family moved from its previous location to the current location in 1964.[18] It is also common cause that Amos Msiza had the use of grazing land on Rondebosch. The applicant testified that from the early 1970s his father had about 26 to 28 cattle and the highest number was 38 cattle and 24 goats.[19] At all material times, the deceased's father, Mr Swartbooi Msiza, the deceased and his family resided, grazed cattle and cropped on Rondebosch.[20]

59 In 1999 the Dee Cee Trust acquired the entire Rondebosch farm (352.5033ha) for R400 000. The land awarded to the applicant is 45.8522ha of that land. The difference between the purchase price of the entire land – R400 000 – and the third and fourth respondents' current valuation of the piece of land subject to the claim which is at R4 360 000 or R1, 800 000 would be quite significant.

60 The evidence given by the landowners was that their acquisition of the land in 1999 cannot be considered as a market related transaction since the person who sold the land to them had some sort of affinity for them, based on personal relations. I do not see how this influences the basic facts of the case. The fact is that the purchase price – from which I must work – was R400 000 in 1999 for the entire piece of land at 352 ha. Now fifteen years later, a small portion of that land, 45 ha, has been valued at R4,36m (and by the state at R1.8m). This

[18] *Msiza* (2004) at para [15].
[19] *Msiza* (2004) at para [91].
[20] *Msiza* (2004) at para [31].

would be a significant benefit given that there has been no change in the actual use of the land and there has been no significant investment made by the landowners in that period. The land was acquired as an agricultural farm. It remains as such to date.

61 I accept that since more than 15 years have passed since the land was acquired, it is reasonable that there should have been an increase in value. However, the present increase is so significant that it would run counter to the objects of compensation set in section 25 of the Constitution. The object of section 25 is not to reward property speculators. It is to serve the public interest. On these facts, it would be unfair to the national fiscus to reward the landowner on such a scale, with no discernible public benefit. The payment in excess of R4m which he seeks would simply not reflect the “equitable balance” between the public interest and his interests as required by section 25 of the Constitution.

62 As mentioned above, at the time that the third and fourth respondents purchased the land they were aware that there was a pending claim on the land. The only reason given for the purchase of R400 000 was that the sellers of the property and the current owners were known to each other. It was not the evidence that the price was influenced in any manner by the fact of the labour tenancy claim of the applicant.

63 I conclude that these factors listed below, justify a downward adjustment of the amount. First, the Dee Cee Trust paid a modest amount when it purchase the affected land in 1999. Second, the Dee Cee Trust was aware of the application

for acquisition of land against the affected land at the time of purchase. Third, the Msiza family has resided on Rondebosch farm since 1936 which gives them a significant interest in the land.

The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property

64 As in *Khumalo*,[21] this factor is not relevant in the present circumstances. This factor will only be relevant in cases where the owner's acquisition of the property and capital improvement of the property was made with the assistance of direct subsidies of the apartheid stat. this factor was included in section 25(3) of the Constitution to ensure that the State does not compensate an owner for improvements made to property with apartheid state subsidies.[22]

The purpose of expropriation

65 The central principle of section 25(3) is that compensation must reflect an equitable balance between the public interest and the interests of those affected. This is established by considering each of the factors in turn. Section 25(3)(e) makes it clear that the purpose of the expropriation must be considered when determining the amount of compensation.

[21] At para [93].
[22] See P J Badenhorst "Compensation for Purposes of the Property Clause in the New South African Constitution" (1998) 31 De Jure 251,262; A J van der Walt *Constitutional Property Law* (2005) 276; M Everingham & C Janneke "Land Restitution and Democratic Citizenship in South Africa" (2006) 32 *Journal of Southern African Studies* 545, 554; A Claasens "Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation" (1993) 9 SAJHR 422, 424.

66 The most practical and compelling interpretation is that factor (e) exists primarily to further the objectives of land reform in South Africa. Thus, when factor (e) is read in conjunction with section 25(8) of the Constitution, which directs the state to promote land reform, this would support the interpretation that compensation below market value can be paid in land reform cases.[23] By considering the purpose of the expropriation as a factor (in this instance security of tenure for labour tenants and the purpose to redress the injustices of the past), the Constitution effectively creates a counter weight to market value, which to date has served as the central consideration in calculating compensation.

67 In *Agri South Africa v Minister for Minerals and Energy*,[24] the Constitutional Court stated that:

> *"[T]he approach to be adopted in interpreting section 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged."*[25]

68 As discussed above, the application of the *Point Gourde* principle is limited to

[23] P J Badenhorst "Compensation for Purposes of the Property Clause in the New South African Constitution" (1998) 31 *De Jure* 251,262.
[24] 2013 (7) BCLR 727 (CC).
[25] *Agri SA* at para [60].

the determination of market value.[26] It cannot be applied when applying section 25(3)(e), which is based on a different legal dispensation. The very inclusion of this factor (e) in section 25(3) indicates that it is intended to limit the *Point Gourde* principle.

69 While the two-step approach has been utilised by several Courts, in each of these applications market value has played a disproportionately significant role. In *Highlands*, compensation was determined with reference to market value at the time of the expropriation and no adjustments were made to this amount based on the additional factors in section 25(3) of the Constitution.[27] Gildenhuys J did not make any adjustments to the market value in this case because he found that the only acceptable evidence led by the parties concerned was the market value. Therefore, he found that market value constituted just and equitable compensation in the circumstances.[28]

70 Similarly, the *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) (par [19]), the SCA ruled that compensation was based on the Constitution, but focused on market value in calculating compensation since it was the only quantifiable value.

71 It was mentioned that in the *City of Johannesburg Metropolitan Municipality v*

[26] In *Khumalo*, it was held that the principle should be applied in section 25(3) as a whole. When regard is had to the origins of the *Point Gourde* principle, it is clear that the principle was developed in a jurisdiction where the market value was the only applicable tool for determination of compensation. In my conclusion, the *Pointe Guorde* principle can apply only to market value, not the whole of section 25.
[27] *Highlands* para [81].
[28] *Highlands* para [81].

The Chairman of the Valuation Appeal Board for the City of Johannesburg[29] that:

> *"The valuation process consequently calls for skill and experience, without which a valuer would find it difficult to arrive at a logic deductions from the facts … A valuer's awareness of existing market conditions and trends, together with his knowledge of the circumstances and the facts relating to the property concerned, enable him to understand how the buying and selling public think, and through his skill and experience he should be able to recognise the element most likely to influence intending purchasers."*[30]

The Court stated that:

> *"Valuation is accordingly not an exact science. The market value of property can only be estimated and precisely determined, and a valuer is called on to exercise professional skills and expertise in a specialised field by expressing an opinion on the market value in monetary terms".*[31]

72 In my view, the purpose of the expropriation should be given due weight. The recognition of labour tenants rights in terms of the Act is a key consideration when regard is had to the scheme of the Act as a whole. And so is the history and manner of acquisition. These factors are also ascertainable on the facts of this case. It is not difficult to ascertain when, how and how much was paid by

[29] (282/2013) [2014] ZASCA 5 (12 March 2014).
[30] *City of Johannesburg* at para [24].
[31] *City of Johannesburg* at para [25].

the landowners for the land in question. And it is also not difficult to determine the reason and justification for the expropriation.

73 In this regard, I should also deal with the Expropriation Act, 1975. In *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) the Constitutional Court had to consider the question whether the Expropriation Act was still valid in light of the new principles for just and equitable compensation set out in section 25(3) of the Constitution. Mokgoro J writing for the majority found that the "*construction of the relevant provisions of the Expropriation Act and section 25(3) is different but does not give rise to inconsistency*". While noting that it would have been preferable for the legislature to have brought the Expropriation Act in line with the Constitution. To this end, Mokgoro J adopted the two-step approach first set out in *Highlands*. Under this approach, a Court first determines the market value of the affected land then balances this amount against the remaining factors contained in section 25(3) of the Constitution.

74 While admitting that the two-step approach "is not ideal", the majority held that the two-step approach was practicable given that market value is the factor in section 25(3) most "readily quantifiable". In her judgment, Mokgoro J took pains to emphasise that section 25(3) does not give market value a central role in the determination of compensation, and that under the two-step approach market value should be treated merely as the starting point. It should be noted here that while market value is more readily ascertainable than a value placed on the other factors in section 25(3), a valuation "*is to a material extent a matter of conjecture*".

75 The judgment of the Court in *Du Toit* was not unanimous, and the minority decision (per Langa ACJ with Ngcobo, O'Regan and Van der Westhuizen, JJ concurring) did not approve of the interpretation of the relationship between section 12 of the Expropriation Act and section 25(3) of the Constitution. Langa ACJ was of the view that the Constitution "*expressly insists upon a different approach – one which makes justice and equity paramount, not as a second level 'review' test but at the test for the calculation of compensation*". In the view of the minority, the two-step approach would continue to privilege market value over other considerations of equity and justice provided for in the Constitution.

76 While applying the two-stage method, in this judgment, I have specifically not given market value any undue advantage over the other considerations. I have attempted to undertake a balanced consideration of the factors which would influence my determination on what is just and equitable. Factors such as history behind the acquisition, the purpose of the acquisition and the objects of South Africa's land reform policy have loomed large in my enquiry. The market value has had to yield to other compelling considerations in the quest to strike an appropriate equilibrium between the public interest and the interests of those affected by the act of expropriation. I apply the principles next.

DETERMINING JUST AND EQUITABLE COMPENSATION

77 I have followed the method followed in this Court in its previous judgments

including the employment of the two-stage method for deciding just and equitable compensation. In so doing, the intention is not to confer market value any privileged status, but to use it purely as an entry point in the exercise. Some cases will not use market value as an entry point. But it has not been necessary to make that determination in this case.

78 The government indicated that it was willing to settle the claim at the market value, provided that such value is calculated according to the present use of the land – the agricultural use – as opposed to the potential development of the property – or township development use.

79 Despite the willingness of the state to pay the market value of the property, I am not satisfied that the market value of the land, as agricultural, is just and equitable and reflects an equitable balance between the public interest and the interest of those affected by the expropriation. I have concluded that the amount must be adjusted downwards.

80 My reasons for this decision are set out above, but in summary these are the reasons:

80.1 First, there is a disproportionate chasm between the amount paid by the landowners to acquire a much greater area, and the market value which they seek to claim.

80.2 Second the landowners have not made any significant investments in the land since they acquired it.

80.3 Third, the use of the land has not changed in the 15 years since it was acquired.

80.4 Fourth, when the land was acquired, it was known that there was a claim and the applicants were residing on the land.

80.5 Fifth, the claim succeeded in 2004. At least since this period, it was clear that the land would not be owned by the third and fourth respondents.

80.6 Sixth the object of the compensation is land reform – which is expressly mentioned in the Constitution under the rubric of public interest. The national fiscus should be saddled with extravagant claims of financial compensation, when the clear object of taking the land is to address a pressing public interest concern such as land reform;

80.7 Seventh, it is significant that the applicants have lived and worked in the farm since 1936, as labour tenants. In this regard, it will be remembered that the very purpose of the Labour Tenants Act is to compensate labour tenants who can prove that they worked on land in exchange for the right to reside on the land.

81 Accordingly I decline to approve the proposal of the landowners as not being just and equitable. Similarly the offer by the state to pay a market value is not approved.

82 It is determined that the correct amount which would be just and equitable is R1, 500 000 (one million five hundred thousand rand).

ORDER

83 The following order is issued:

1. In terms of section 25(2)(b) of the Constitution, it is decided that the just and equitable compensation to be paid by the first and second respondents (the one paying the other to be absolved) is R1 500 000 (one million five hundred thousand rand) for the acquisition of the property described by this Court as "*the area of the homestead*, *demarcated by the fence on the perimeter of the homestead yard*"; "*four parcels of cropping land, each 600 x 50 paces in extent*"; and "*grazing land in extent equal to the rest of Rondebosch less the remainder of the ploughing fields*" (the property).

2. The first and second respondents, the one paying the other to be absolved, are directed to make payment to the third and fourth respondent the amount of R1 500 000 (one million five hundred thousand rand) for the acquisition of the property, within 60 days of this judgment.

3. The first and second respondents are directed to take appropriate steps to ensure that the property is registered in the name of the applicant.

4. The steps referred to in paragraph 3 of this order should be finalized within 90 days of this order.

5. There is no order as to costs.

T Ngcukaitobi

T NGCUKAITOBI AJ

Acting judge of the Land Claims Court

I agree

pp T Ngcukaitobi

MP CANCA AJ

Acting judge of Land Claims Court

5 July 2016

APPEARANCES:

For Applicant: T Mbhense
Legal Resources Centre

For First and Second Respondents: Adv P Nonyane
Instructed by State Attorney

For Third and Fourth Respondents: Adv G Scheepers
Instructed by E Taljaard